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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

JOHN PENNA,

Plaintiff and Appellant,

v.

NECATI ERGUR,

Defendant and Respondent.

A117629, A118491, & A118699

(San Mateo County
Super. Ct. No. CIV 421177)

Defendant Necati Ergur (defendant) executed a promissory note (the note) in favor of plaintiff, real estate broker John Penna (plaintiff), in exchange for a $42,481 loan toward the purchase of real property. When defendant failed to make payment, plaintiff brought this action on the note, and defendant cross-complained for fraud and negligence. The trial court concluded after a bench trial that the note created an equitable mortgage and held, for that reason, that the "one form of action" rule (Code Civ. Proc., § 726) barred plaintiff's action and required him to proceed against the property in foreclosure. No trial was held on defendant's cross-complaint, as the trial court concluded that it had been dismissed by an earlier judgment from which defendant had not appealed.[1] Defendant submitted a proposed "Order for Judgment" (the Order), which the trial court

[1] Plaintiff's consolidated appeals bring this matter before us a second time. In 2003, the action was dismissed when plaintiff failed to appear at a court-ordered hearing. We reversed the judgment and remanded the matter for further proceedings, concluding that plaintiff was entitled to relief under Code of Civil Procedure section 473. (See *Penna v. Ergur* (Dec. 27, 2004, A103808, A103997) [nonpub. opn.].)

signed and filed, dismissing plaintiff's causes of action and setting out its conclusion regarding the cross-complaint.

Plaintiff does not appeal from the Order, but from a purported "Judgment" that the trial court signed over 14 months later. As we conclude that the Order constituted an order of dismissal (Code Civ. Proc., § 581d) and an appealable judgment from which plaintiff failed to file a timely notice of appeal, we must dismiss plaintiff's appeal from the purported "Judgment." In addition, we affirm the trial court's orders denying plaintiff leave to assert additional causes of action more than seven months after the appealable judgment, denying him prevailing party status, and awarding attorney fees to defendant, as plaintiff has not demonstrated error in this regard. For the same reason, we also affirm the trial court's denial of plaintiff's motion to amend or void the judgment, in which he sought to revive the action by contending, contrary to his earlier position, that defendant's cross-complaint had not been properly dismissed.

FACTUAL AND PROCEDURAL BACKGROUND

The Transactions at Issue

In early 2001, plaintiff was a real estate broker, acting as the agent of both the buyer and the seller in connection with the sale of residential real property located at 326 Railroad Avenue and 327 1st Lane in South San Francisco (the Railroad Avenue property), which was under contract to defendant's employee. Plaintiff had handled several prior transactions for defendant, who was engaged in the business of real estate investment and property management on behalf of his family, and when the employee failed to qualify for a loan, plaintiff urged defendant to assume the contract.[2] As defendant's funds were tied up in other business transactions, plaintiff offered to loan him money toward the down payment on the property. Defendant agreed, the parties

[2] Although defendant takes title to real property in his own name, he otherwise acts through his brother and agent, Koray Ergur, who negotiates real estate deals on his behalf. Koray Ergur negotiated the transactions at issue in these consolidated appeals, and plaintiff had no direct dealings with defendant. Except as specifically stated, we treat the acts of Koray Ergur on defendant's behalf as those of defendant.

proceeded with the sale, and plaintiff tendered a $42,481.11 check on defendant's behalf toward the down payment.[3]

The parties memorialized the loan in a promissory note that the escrow officer prepared in plaintiff's presence. Defendant, who had no participation in the drafting of the note, executed it as "Payor" on May 3, 2001, along with the escrow documents. Neither party objected to its provisions. The promissory note, though denominated "Note Secured by Deed of Trust (Straight Note)," does not grant a power of sale or expressly create a security interest in the property. It provides: "This note is secured by a Personal Guarantee of Borrower herein." No evidence was produced at trial to show that a separate deed of trust or personal guarantee was ever prepared and executed. The note contains a due on sale clause allowing the "Beneficiary" to declare all sums owed on the note immediately due and payable in the event the "Trustor . . . sells, agrees to sell, transfers[,] or conveys its interest in 326 Railroad Avenue and 327 1st Lane, South San Francisco, CA 94080 or any part thereof or any interest therein . . . ." It identifies the property again below the signature line: "Property: 326 Railroad Avenue and 327 1st Lane, South San Francisco 94080, Lot Block." In bold print at the top, the note also provides: "When paid, said original note, together with the Deed of Trust securing same, must be surrendered to Trustee for cancellation and retention before reconveyance will be made." The terms "Beneficiary," "Trustor," and "Trustee" are not defined. The note, which was due and payable on or before June 4, 2001, was never paid.

On June 25, 2001, the parties entered into a three-month exclusive listing agreement (the listing agreement) on real property defendant owned at 526 Highland Avenue in San Mateo, California (the Highland Avenue property). The parties later extended the listing agreement for an additional three months. The property did not sell during this time, and when the listing eventually expired in January 2002, defendant

[3] To finance the remainder of the $485,000 purchase price, defendant also executed promissory notes to the seller ($48,500) and to the bank ($388,000), both of which were secured by deeds of trust. Defendant defaulted on the note to the seller, but cured the default after foreclosure proceedings were initiated.

listed it through another broker. Shortly thereafter, plaintiff sent defendant a letter demanding reimbursement for costs in marketing the Highland Avenue property and, simultaneously, sent a separate demand for payment of the note.

Both the note and the listing agreement contain attorney fees provisions, which we set out fully in our discussion of the attorney fee award below.

This Action and the First Appeal

On March 8, 2002, plaintiff filed a form complaint against defendant, asserting a cause of action for breach of contract and common counts for an account stated and for money lent upon request. Defendant filed an answer and asserted a cross-complaint against plaintiff for misrepresenting the value of the Railroad Avenue property, fraudulently entering into the listing agreement with no intention of performing, and negligently marketing the Highland Avenue property.

In April 2003, plaintiff failed to appear at a hearing to show cause why the parties had not proceeded to court-ordered arbitration (OSC hearing), and Superior Court Judge Quentin L. Kopp (Judge Kopp), who presided over the case management calendar, ordered that the action be dismissed and, in June 2003, denied plaintiff's motion for relief from the dismissal (Code Civ. Proc., § 473). When defendant moved for attorney fees, plaintiff opposed the motion, contending that the cross-complaint also had been dismissed as part of the "action." While Judge Kopp was considering this issue, plaintiff filed a notice of appeal from the judgment of dismissal and the order denying his motion for relief. Judge Kopp issued a written order, on September 15, 2003, that "all further proceedings relative to the cross-complaint are stayed pending finality of the appeal." In December 2004, we reversed the judgment and remanded to the trial court for further proceedings, concluding that plaintiff was entitled to relief from the dismissal under Code of Civil Procedure section 473. (*Penna v. Ergur*, *supra*, A103808, A103997.)

The Trial and the "Order for Judgment"

On November 29, 2005, the matter proceeded to a bench trial on plaintiff's complaint. Defendant sought to litigate his cross-complaint as well, claiming it had been stayed pending appeal, but plaintiff contended it had been dismissed as part of the earlier

judgment, and the trial court deferred a ruling on this issue until the end of trial. The parties and Koray Ergur testified at trial. Defendant conceded that he had not paid the note, but asserted that it was secured by the Railroad Avenue property and that plaintiff therefore was required to proceed in judicial foreclosure against the security. Defendant claimed that, in any case, plaintiff had agreed to cancel the note in exchange for an extension of the Highland Avenue listing agreement (cancellation defense).

After a bench trial, the trial court heard from the parties regarding the status of the cross-complaint, then announced its decision orally on the record. The trial court concluded that defendant had established by clear and convincing evidence that the note constituted an equitable mortgage and deemed his affirmative defense under Code of Civil Procedure section 726 "well-taken." The trial court rejected defendant's contention, however, that plaintiff had released him from his obligation on the note in exchange for an extension of the Highland Avenue listing agreement. The trial court also concluded that the cross-complaint had been dismissed in 2003, as the judgment dismissing the "action" contemplated the case as a whole, defendant had behaved as if the entire action had been dismissed and had not appealed from the judgment, and any subsequent ruling purporting to stay the cross-complaint was ineffective to revive it. Neither party requested a statement of decision (Code Civ. Proc., § 632), and the trial court asked defense counsel to "provide an appropriate order . . . for the court."

Attempting to delay the formal entry of judgment, defendant prepared a proposed "Order for Judgment" (the Order), which the trial court signed and filed on December 23, 2005.[4] The Order provides: "Only the causes of action in Plaintiff's complaint were

[4] Defendant sought to delay the formal entry of judgment because he "[did] not want to deprive the Court of jurisdiction to resolve his claim for attorney's fees as the prevailing party" and so that he could include an attorney fee award in the final judgment. The trial court retains jurisdiction to determine the parties' rights to recover their attorney fees after entry of judgment. Indeed, the time for requesting attorney fees is the same as that for filing a notice of appeal. (Cal. Rules of Court, rule 3.1702; see *id.*, rule 8.104(a).) Like notices of appeal, attorney fee motions filed before entry of judgment are premature, though they may be considered if the opposing party has not been prejudiced. (*Yuba Cypress Housing Partners, Ltd. v. Area Developers* (2002) 98 Cal.App.4th 1077, 1086.)

submitted for trial. The Court determined that Defendant's cross-complaint had been dismissed on April 4, 2003, as part of Judge Quentin Kopp's order dismissing the 'action.' [¶] As to Plaintiff's causes of action, the Court, having evaluated the exhibits admitted into evidence in this case, having considered the testimony of the witnesses, including their demeanor on the stand, and having drawn all reasonable inferences from the evidence presented, rules that the Plaintiff's causes of actions [*sic*] are dismissed, and that Plaintiff shall take nothing from his complaint." Defendant served notice of entry of the Order on December 28, 2005.

The Parties' Cross-Motions for Attorney Fees

Shortly thereafter, defendant filed a motion for attorney fees and costs. (Civ. Code, § 1717; Code Civ. Proc., § 1032.) Plaintiff opposed the motion, claiming that he, and not defendant, was the prevailing party on the complaint, as defendant had simply forced him to proceed in foreclosure and had not avoided the debt altogether. Plaintiff also claimed to have prevailed on the cross-complaint, as it had been involuntarily dismissed. He filed a separate motion to be determined the prevailing party on the cross-complaint and as to the cancellation defense, contending that he was entitled to attorney fees under both the note and the listing agreement. In mid-February 2007, the trial court denied plaintiff's motion to be declared the prevailing party and granted defendant's motion for attorney fees and costs in an amount to be determined based on subsequent pleadings.

Plaintiff's Motions for Leave to Assert New Causes of Action

In August 2006, over seven months after the trial court signed the Order, plaintiff moved for leave to file a proposed "cross-complaint" to assert four additional causes of action that he claimed were compulsory, as they related to the causes of action in defendant's cross-complaint. (See Code Civ. Proc., §§ 426.30, subd. (a), 426.50). Plaintiff sought to recover a real estate commission under the Highland Avenue listing agreement, compensatory and exemplary damages for fraud in connection with the listing agreement, and declaratory relief arising out of new allegations that defendant had transferred title to the Railroad Avenue property in December 2003. Because of

defendant's alleged transfer of title, plaintiff asked the trial court to conclude that defendant was estopped from asserting the "one form of action" defense and to excuse his own failure to amend to assert a foreclosure cause of action. Plaintiff attached a certified copy of the grant deed transferring the Railroad Avenue property in December 2003 and asked the trial court to take judicial notice of it. Shortly after filing this motion, plaintiff moved for leave to file an amended complaint to add a cause of action for judicial foreclosure, but did not attach a proposed amendment. In February 2007, without addressing plaintiff's motion for leave to amend, the trial court denied his motion for leave to file a cross-complaint, concluding that it was untimely, unfairly prejudicial, and made in bad faith.

The Purported "Judgment" and Subsequent Proceedings

On February 28, 2007, the trial court signed a proposed "Judgment," prepared by defendant, which provides: "The Court previously executed an order for judgment on December 23, 2005, with notice of entry duly entered by Necati Ergur. By order dated February 12, 2007, the court denied Plaintiff John Penna's motion for leave to file a cross-complaint. On February 12, 2007, the Court also signed an order determining that Defendant Negati Ergur was the prevailing party in granting Defendant Ergur's motion for attorneys' fees and costs, in an amount to be determined based on subsequent pleading." The trial court repeated its order that plaintiff take nothing and expressly decreed that defendant was the prevailing party entitled to attorney fees in an amount to be set by the court. At the time the purported "Judgment" was filed, defendant moved to set attorney fees and costs of more than $116,000. Defendant served notice of entry of judgment on March 2, 2007.

In April 2007, after learning that it had failed to rule on plaintiff's motion for leave to amend, the trial court issued an order denying the motion. Shortly thereafter, plaintiff filed a motion to amend or void the judgment, seeking to revive the action through the cross-complaint. Plaintiff claimed, contrary to his earlier position, that Judge Kopp had only stayed proceedings on the cross-complaint and that it had not been properly dismissed in any case. For this reason, plaintiff contended that the judgment was

premature and void, that defendant's cross-complaint should be tried on the merits, and that the trial court's prevailing party determination and orders denying leave to amend and to file a responsive cross-complaint should be vacated. Plaintiff asserted that the trial court could not otherwise make a meaningful determination of the prevailing party and that it would be unfair in such case to deny him leave to amend and to file his own cross-complaint. On May 14, 2007, two weeks after plaintiff had filed a notice of appeal from the purported "Judgment," the trial court denied the motion on multiple grounds, rejecting plaintiff's contention that the cross-complaint had not been properly dismissed, noting that he did not have standing to challenge the dismissal of defendant's cross-complaint, and concluding that he was judicially estopped from doing so, in any case, by his earlier, inconsistent position.[5]

Plaintiff filed a timely notice of appeal from the trial court's order denying his motion (No. A118491).

The trial court later awarded defendant attorney fees of $85,230, making minor adjustments to the requested amount and reducing it by 15 percent to reflect the absence of complex issues in the case, its average degree of difficulty, and the minimal amount sought under the note. Plaintiff filed a timely notice of appeal from this order (No. A118699). All three appeals were later consolidated by this court.

DISCUSSION

I. *Plaintiff's Appeal from the Judgment Must Be Dismissed*

A. The Trial Court's December 2005 Order Was an Appealable Judgment

Defendant does not deny that the February 2007 "Judgment" is appealable or dispute the timeliness of plaintiff's notice of appeal. Nonetheless, a timely notice of appeal from an appealable judgment or order is a requirement on which our jurisdiction rests, and we must confirm that it has been met before considering plaintiff's appeal on

[5] On May 1, 2007, plaintiff filed a notice of appeal from the February 2007 "Judgment," the trial court's orders denying his motions for prevailing party status, for leave to amend, and for leave to file a cross-complaint, and the trial court's order granting defendant's motion for attorney fees (No. A117629).

the merits. (*Sharp v. Union Pacific R.R. Co.* (1992) 8 Cal.App.4th 357, 361; *Laraway v. Pasadena Unified School Dist.* (2002) 98 Cal.App.4th 579, 582 (*Laraway*); see *Griset v. Fair Political Practices Com*. (2001) 25 Cal.4th 688, 696 (*Griset*).) Here, this threshold question turns on our characterization of the trial court's December 2005 Order, filed over 14 months before the purported judgment from which plaintiff appeals. If we determine that the Order was an appealable judgment, it commenced the time for appeal and rendered the February 2007 "Judgment" "functionally superfluous." (See *Laraway*, at p. 583 ["Once a final, appealable order or judgment has been entered, the time to appeal begins to run," and a subsequent judgment or appealable order setting out the same decision does not restart or extend the time to appeal]; *Eliceche v. Federal Land Bank Assn.* (2002) 103 Cal.App.4th 1349, 1359-1360 (*Eliceche*).) As we explain below, we conclude that the Order constituted an appealable judgment, that plaintiff's notice of appeal was untimely, and that we must dismiss plaintiff's appeal from the judgment.

In determining whether a judicial order is appealable, its label is not determinative; we consider its substance and effect, not its form. (*Griset*, *supra*, 25 Cal.4th at p. 698.) We observe that, notwithstanding its denomination, the Order does not constitute an "order for judgment" as that term is defined in the case law. This designation is used to refer to an oral statement by the trial court, usually entered in the minutes, indicating which party should prevail, setting out its opinion about how judgment eventually should be entered, or stating its intent to rule in a particular manner in a subsequent judgment. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 161, pp. 237-238.) It is preliminary to a final judgment and, therefore, not appealable. (*Ibid.*) By contrast, the December 2005 Order is a formal written order, and nothing in its language suggests that it was preliminary or that the trial court contemplated the preparation of a subsequent judgment. On the contrary, it evidences a *present* decision by the trial court denying relief to plaintiff and dismissing his causes of action: "the Court . . . rules that the Plaintiff's causes of [action] *are* dismissed, and that Plaintiff shall take nothing from his complaint." (Italics added.) As the Order is in writing, signed by the trial court, and filed in the action, we hold that it constitutes an order of dismissal and

an appealable judgment on the complaint. (See Code Civ. Proc., § 581d ["All dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action and those orders when so filed shall constitute judgments and be effective for all purposes . . ."]; *Eliceche, supra,* 103 Cal.App.4th at pp. 1359-1360 & fn. 12; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 699.)

The Order does not purport to dismiss the cross-complaint, however; it simply states the trial court's conclusion that the cross-complaint had been dismissed earlier by Judge Kopp's order. The Order constitutes a final appealable judgment nonetheless, as it resolves all the issues between the parties and sets out the trial court's final determination of their rights. (See Code Civ. Proc., § 577 [defining "judgment" as "the final determination of the rights of the parties in an action or proceeding"]; *Griset, supra,* 25 Cal.4th at p. 698 [where no issue remains for future consideration, and no further judicial action is necessary to a final determination of the rights of the parties, a decree is final].)[6] We note, significantly, that the purported judgment in February 2007 added nothing to the trial court's earlier determination on the merits. The record also demonstrates, without question, that the trial court viewed the Order as its final judgment.[7]

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[6] The Order left only the matter of attorney fees for the trial court's determination. (See *Laraway, supra,* 98 Cal.App.4th at p. 582, fn. 3 [noting that the matter of attorney fees does not effect an order's finality and appealability, as this is commonly addressed in a postjudgment order that is independently appealable].)

[7] At a May 2006 hearing, the trial court seemed surprised that further action was required to enter judgment, as the parties contended, and treated the asserted absence of a judgment as an oversight to be corrected as soon as possible. At a subsequent hearing, the trial court observed: "[S]eems to me judgment has basically been entered. Isn't it a little late for this proceeding [seeking to assert new causes of action]? And given the fact that all was before me was a question of attorney's fees." Likewise, in its order denying plaintiff leave to file a cross-complaint, the trial court noted that all causes of action had been submitted and decided and that an order for judgment had been entered: "The order for judgment is substantively the same thing [as the actual entry of judgment], disposing of this case on the merits in its entirety, except for the issue of attorney's fees and costs." Most compelling, however, is the order awarding attorney fees, which the trial court apparently drafted itself. The number of hours the trial court noted that defense counsel

Finally, we observe that construction of the Order as a final judgment is consistent with the procedures governing the trial court's issuance of a final decision in this case. (See Code Civ. Proc., § 632 [trial of a question of fact by the court]; Cal. Rules of Court, former rule 232, now rule 3.1590 [same].) The trial court's announcement of its ruling on the record and in the presence of the parties at the end of trial constituted its tentative decision. (See Cal. Rules of Court, former rule 232(a), now rule 3.1590(a).) As neither party requested a statement of decision, the trial court was required to prepare and mail a proposed judgment to all parties within 10 days after submission of the cause, or to have a party do so, and allow 10 days for objection. (See *id.*, former rule 232(e), now rule 3.1590(g) [within 10 days after expiration of time to request statement of decision].)[8] The trial court was required to sign and file its judgment within 10 days after the time for objection had expired. (See *id.*, former rule 232(e), now rule 3.1590(h) ["The judgment so filed shall constitute the decision upon which judgment shall be entered . . ."].)[9] Defense counsel prepared the Order at the trial court's request, and presumably served it on plaintiff, as it contains a signature line allowing his counsel's approval as to form. The trial court signed and filed it 23 days after submission of the cause at trial, within the

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had invested "prior to judgment" matches the fee statements for services through December 8, 2005, and those incurred "subsequent to the judgment" correspond to services after December 2005.

[8] The Order provides that "[t]he testimony and arguments lasted less than eight hours." In such cases, the parties must request a statement of decision before submission of the matter for decision. (Code Civ. Proc., § 632.)

[9] This rule does not apply when a trial is "completed within one day" but appears to remain applicable to trials that take place over more than one day, even if they consume less than eight hours. (See *In re Marriage of Hafferkamp* (1998) 61 Cal.App.4th 789, 793, fn. 8 (*Hafferkamp*); Cal. Rules of Court, former rule 232(h), now rule 3.1590(k).) Certain basic requirements of this rule appear to apply to short causes of action in any case. (*Hafferkamp*, at p. 793, fn. 8 [requirement that judgment be signed].)

requisite period for filing its judgment.[10] Absent evidence to the contrary, we may presume that the trial court followed established law. (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 913-914, applying Evidence Code section 664 [presumption that official duty has been regularly performed].)

As we hold that the December 2005 Order constitutes an appealable judgment, plaintiff's notice of appeal was more than a year late—a jurisdictional defect not remedied by the purported "Judgment" issued later and requiring dismissal of his appeal.[11] (See Cal. Rules of Court, former rule 2(b), now rule 8.104(b); *Eliceche*, *supra*, 103 Cal.App.4th at pp. 1359-1360.) In reaching this result, we are mindful that defendant, who prepared the December 2005 Order, designated it as an "order for judgment" in a purposeful but misguided attempt to postpone entry of judgment, and that he will benefit from the confusion he has created in this regard. We have no power, however, to weigh the equities and assume appellate jurisdiction where none exists. (See *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 666-667 [court has no discretion to hear untimely appeal and must dismiss on its own motion even if no objection is made], overruled on other grounds as stated in *Forman v. Knapp Press* (1985) 173 Cal.App.3d 200, 202.)[12] We observe, in any case, that plaintiff, who

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[10] The trial court may extend these time limits by written order (see Cal. Rules of Court, former rule 232(g), now rule 3.1590(j)), but the record does not reflect that the trial court did so.

[11] The time for appeal began to run when defendant served notice of entry of the Order and expired in February 2006. (See Cal. Rules of Court, former rule 2(a)(2) & (f), now rule 8.104(a)(2) & (f) [" 'judgment' includes an appealable order"].) Even if it were deemed to run from the entry of the Order, it expired in June 2006. (See *id.*, former rule 2(a)(3) & (d)(3), now rule 8.104(a)(3) & (d)(3) [the entry date of appealable order not entered in the minutes is the date the signed order is filed].)

[12] With these principles in mind, we emphasize that the term "order for judgment" is used only in referring to the trial court's oral pronouncement of its intended decision and has no place as a formal written order. Accordingly, we urge the trial courts not to issue such orders and not to sign proposed orders so denominated. If the trial court's intent is to set out its opinion as to how judgment should be rendered, a memorandum of opinion, a tentative ruling, or, in proper cases, a proposed statement of decision would

ultimately bore the responsibility of protecting his rights to appellate review, acquiesced in the attempted delay of judgment. (See *Jordan v. Malone* (1992) 5 Cal.App.4th 18, 21.) Moreover, we are satisfied that the result occasioned by defendant's procedural wrangling will not produce any serious inequity, as plaintiff's appeal would fail on the merits in any event.

B. **On the Record Presented, Plaintiff's Action Was Properly Dismissed**

Under the "one form of action" rule, the holder of a note secured by a mortgage may not bring an action directly against the maker of the note and must proceed instead in foreclosure against the security.[13] (Code Civ. Proc., § 726; see generally 4 Witkin, Summary of Cal. Law (10th ed. 2005), Security Transactions in Real Property, § 124, p. 917.) This rule extends to equitable mortgages that may arise when the parties to a transaction agree that a debt will be secured by real property, but fail to comply with the formalities of a legal mortgage (Civ. Code, § 2922). (*Kaiser Industries Corp. v. Taylor* (1971) 17 Cal.App.3d 346, 350-352 (*Kaiser*); *Clayton Development Co. v. Falvey* (1988) 206 Cal.App.3d 438, 443-445 [general law governing the rights and remedies of mortgagors and mortgagees applies to equitable mortgages].) The court will recognize an equitable mortgage when: (1) the parties intended a secured transaction, and (2) the instrument that embodies the parties' agreement is reasonably susceptible of interpretation as a mortgage. (*Kaiser*, at p. 351.) The first element is a question of fact that we review for substantial evidence (see *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632); the second requires us to construe the instrument

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serve this purpose without obfuscating the parties' appellate rights. Likewise, the designation of an order on a motion for judgment should reflect the trial court's ruling on the motion (i.e., order granting motion for judgment on the pleadings).

[13] Code Civ. Proc., § 726 provides in relevant part: "There can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property or an estate for years therein, which action shall be in accordance with the provisions of this chapter [procedures for foreclosure]." (Code Civ. Proc., § 726, subd. (a).)

independently (see *Safai v. Safai* (2008) 164 Cal.App.4th 233, 244-245 [de novo review of construction of a writing in the absence of extrinsic evidence]).

The language of the note speaks to both of these issues. The note expressly refers to a deed of trust, uses trust terminology, and implies a restriction on defendant's ability to transfer the Railroad Avenue property, as it includes a due on sale clause and contemplates satisfaction and cancellation of the note before reconveyance is permitted. In light of these provisions, we conclude that the note may reasonably be construed as a mortgage. (See Civ. Code, § 2920, subd. (a) ["A mortgage is a contract by which specific property . . . is hypothecated [pledged for security for a debt] for the performance of an act, without the necessity of a change of possession"]; *Kaiser, supra*, 17 Cal.App.3d at pp. 350-352 ["it [is] clear that an equitable mortgage may be created by a document restricting the owner's right to convey or encumber his real property if that is the intention of the parties"].) This language also suggests that the parties intended to secure the debt with the Railroad Avenue property. The instrument need not specifically mention a security interest if the parties' intent to create such an interest otherwise appears. (*Kaiser*, at p. 351.) Moreover, "[t]he intent need not show on the face of the instrument," and the trial court may look to extrinsic evidence of such intent. (*Ibid.*) At trial, Koray Ergur agreed that he and plaintiff had discussed whether the loan would be secured and testified that "[i]t was going to be secured with the . . . Railroad [Avenue] property." He explained: "[Plaintiff] wasn't just going to take my handshake for it," as he was an experienced real estate broker and would "secure it with the real estate, of course." It was "understood" that plaintiff was not going to make the loan unless it was so secured. The trial court apparently accepted this testimony and inferred from plaintiff's position as a sophisticated real estate broker that he would have protected himself with a security interest in the property. This testimony, along with the language

of the note, constitutes substantial evidence that supports the trial court's implied finding in this regard.[14]

Plaintiff takes issue with the inferences drawn by the trial court and highlights evidence supporting a finding that the note was not secured by the property. We do not reweigh the evidence, however, and affirm the trial court's implied finding of intent if substantial evidence supports it, resolving all evidentiary conflicts and indulging all reasonable inferences in defendant's favor. (See *Elijah R. v. Superior Court* (1998) 66 Cal.App.4th 965, 969; *Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1632-1633.) The standard of proof at trial, conceded by the parties as "clear and convincing evidence," does not affect our analysis in this regard. (See *In re Mark L.* (2001) 94 Cal.App.4th 573, 580-581.) The testimony of a single credible witness, even a party, may constitute substantial evidence. (See *City and County of San Francisco v. Givens* (2000) 85 Cal.App.4th 51, 55-56.) We do not independently evaluate the witnesses' credibility, deferring instead to the assessment of the trial court, which had the opportunity to observe their demeanor on the stand. (See *Hurtado v. Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019, 1024-1025, disapproved on other grounds in *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479.) We reject plaintiff's assertion that the trial court "did not believe any of Koray Ergur's substantive testimony" and take a dim view of his inflammatory and misleading contentions that the trial court was too gracious to call Koray Ergur "a liar outright" and "stopped just short of declaring [him] to be a dishonest witness." Although the trial court expressed frustration with Koray Ergur's

[14] Although the trial court did not specifically find that the parties intended to secure the note with the Railroad Avenue property, we imply such a finding from the trial court's conclusion that the note created an equitable mortgage. (See *County of Orange v. Barratt American, Inc.* (2007) 150 Cal.App.4th 420, 438-439 [when a statement of decision is not requested, the court must infer that the trial court made all factual findings necessary to support the judgment]; see also *Rochester Capital Leasing Corp. v. K & L Litho Corp.* (1970) 13 Cal.App.3d 697, 704 [ambiguity in findings must be construed in favor of the judgment and the court may resort to the record to clarify]; *Tronslin v. City of Sonora* (1956) 144 Cal.App.2d 735, 738 [reference to the whole record in the interpretation of a judgment].)

overly broad responses and his failure to respond directly to specific questions, it apparently accepted his testimony over plaintiff's.[15]

We also reject plaintiff's contentions that, notwithstanding the parties' intent, the trial court erred in applying the "one form of action" rule here. Plaintiff claims that the trial court was "mistaken in [its] beliefs" regarding the availability of a foreclosure remedy and "mistakenly operating on the basis of false perceptions of the law . . . ." He contends, specifically, that the "one form of action" rule does not require foreclosure when the maker of the note no longer owns the property or when the value of the security is insufficient to cover the debt. He contends that defendant sold the Railroad Avenue property in December 2003, relying on evidence not before the trial court at the time of its decision, and claims defendant effectively conceded that the security was inadequate by alleging that the property was worth less than he paid. Plaintiff also asserts that he has no remedy because the statute of limitations has expired on a foreclosure action. He did not raise any of these points until long after the trial court's final decision, however, and if the trial court held any mistaken beliefs, he has only himself to blame.[16]

Indeed, even if we accept the truth of plaintiff's assertions in this regard, we observe that the alleged obstacles to a foreclosure remedy arose from his lack of diligence

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[15] The trial court acted reasonably in rejecting plaintiff's assertion that the note was secured by defendant's personal guarantee, notwithstanding a provision that "[t]his note is secured by a Personal Guarantee of Borrower herein." First, the note also contains multiple references to a trust and implies restrictions on transfer of the property. Additionally, there was no evidence that a separate "Personal Guarantee" was ever prepared, and defendant's attempt to guarantee his own debt appears of little value as security in any case. A guarantee is a promise to answer for the debt of *another*. (See Civ. Code, § 2787; see also *River Bank America v. Diller* (1995) 38 Cal.App.4th 1400, 1420-1421 [sham guaranty where guarantor of note was in fact principal obligor under another name].) We question whether such a "guarantee" provides any rights not afforded by an action on the note.

[16] Indeed, plaintiff raises his statute of limitations argument for the first time on appeal. Points not raised in the trial court will not be considered on appeal. (*Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486.) For this reason, we also conclude that plaintiff has waived his contention that defendant was precluded from establishing an equitable mortgage because he denied his obligation on the note.

in protecting his own interests, not error by the trial court. The record confirms that plaintiff had notice, as early as January 2003, of defendant's contention that he was required to foreclose on the property, well before the limitations period expired in June 2005. (See Civ. Code, § 2911; Code Civ. Proc., § 337.) The answer to the complaint asserts the "one form of action" rule, and defendant claimed in his January 2003 opposition to plaintiff's summary judgment motion that plaintiff was required to proceed in foreclosure. Yet, plaintiff did not seek to add a cause of action for judicial foreclosure until August 2006, seven months after the trial court dismissed his action. Plaintiff also took no steps to preserve his interest in the property during the litigation, such as filing a notice of lis pendens (Code Civ. Proc., §§ 405.20, 405.24.) Plaintiff correctly points out that, in response to inquiry by the trial court before trial on November 29, 2005, defense counsel represented: "The Railroad property is still owned by the Ergurs," even though defendant had sold the property while the first appeal was pending. We note, however, that plaintiff had the means at his disposal to refute defendant's misrepresentation definitively at or near the time it was made, but failed to do so.

In so holding, we do not accept this result as the natural product of the adversary system, as defense counsel so cavalierly suggests. We are troubled, not only by the implications of the evidence plaintiff has brought to light, but also by defense counsel's apparent indifference to the injustice he concedes his client perpetrated through prior counsel. We simply acknowledge the limits of our authority, recognizing, as we must, that plaintiff's remedy lies elsewhere.

II. ***Plaintiff's Motions for Leave to Assert New Causes of Action***

Assuming the trial court's orders denying plaintiff's motions for leave to amend and to file a cross-complaint are appealable,[17] we affirm both orders, as plaintiff has not demonstrated that the trial court erred in this regard.

[17] Although plaintiff's May 1, 2007 notice of appeal was untimely as to the judgment, it was timely as to these orders to the extent they are independently appealable. (See *Grable v. Damar Production Co.* (1965) 232 Cal.App.2d 510, 512 [although appeal

We do not consider whether the trial court properly denied leave to amend, however, as plaintiff has waived any error as to this order by failing to establish it with reasoned analysis and appropriate authority. (See *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 (*Benach*).) On appeal, plaintiff alludes briefly to the order denying leave to amend, noting the circumstances requiring him to amend and simply concluding that the trial court abused its discretion in denying him leave to do so. An appellant must do more than assert that the trial court's decision is wrong. (*Ibid.*) Plaintiff also refers the court to "the cases [he] cited in his moving papers," with no citation to the record. Such an attempt to incorporate the points and authorities below violates California Rules of Court, rule 8.204, which governs the form and content of appellate briefs, and we do not consider contentions raised in this way. (*Estate of Wiedemann* (1964) 228 Cal.App.2d 362, 370-371; accord, *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 294-295 & fn. 20 (*Soukup*); see *Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320, 334.) We note, in any case, that amendment to a pleading will not be permitted once judgment has been rendered, unless the judgment is vacated. (*Young v. Berry Equipment Rentals, Inc.* (1976) 55 Cal.App.3d 35, 38 (*Young*); accord, *M.B. v. City of San Diego* (1991) 233 Cal.App.3d 699, 707; see *Herz v. Hereford* (1928) 88 Cal.App. 290, 291 [trial court acts in excess of its jurisdiction in granting leave to amend after judgment].) Moreover, given plaintiff's unexplained and inexcusable delay in seeking leave to amend, the trial court did not err by refusing to grant it. (See *Young*, at p. 39.)

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from judgment was untimely, it was timely as to special order after judgment].) An appeal lies from a final order made after an appealable judgment if: (1) the issues raised by an appeal from the order are different than those presented in the appeal from the judgment, and (2) the order affects the judgment or relates to it by enforcing it or staying its execution. (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651-652, applying Code Civ. Proc., § 904.1, subd. (a)(2).) The issues that arise in connection with plaintiff's motions to assert new causes of action would not have arisen on appeal from the judgment, which addressed different causes of action. These orders also may satisfy the second appealability requirement, as the addition of new causes of action would have effectively revived the action and defeated the dismissal, as well as the judgment's finality.

The trial court also denied plaintiff's motion for leave to file a proposed cross-complaint, which sought to recover a real estate commission under the Highland Avenue listing agreement, damages for fraudulent misrepresentation regarding the ownership of the Highland Avenue property, and declaratory relief arising out of allegations that defendant had transferred title to the Railroad Avenue property in December 2003. A party who has failed to allege a compulsory cause of action may seek leave to file a cross-complaint asserting it. (Code Civ. Proc., § 426.50; see *id.*, § 426.30, subd. (a) ["[A] party against whom a complaint has been filed and served [who] fails to allege in a cross-complaint any related cause of action which (at the time of serving his answer to the complaint) he has against the plaintiff . . . may not thereafter in any other action assert [it] . . ."].) We need not determine whether plaintiff's proposed causes of action were compulsory as we conclude that the trial court properly denied him leave to assert them in any case.

The trial court concluded that plaintiff's motion was untimely, as it was filed after the December 2005 Order disposed of the case "on the merits in its entirety" and would be unacceptably prejudicial to defendant to allow the cross-complaint, as plaintiff convinced the trial court before trial that defendant's own cross-complaint had been dismissed and prevented a trial on those causes of action. We agree. Code of Civil Procedure section 426.50 allows a party acting in good faith to file a compulsory cross-complaint "at any time during the course of the action." Although we construe this provision liberally to avoid a forfeiture of a cause of action (*ibid.*), we cannot conclude that it contemplates the addition of new causes of action after judgment, particularly one confirming that the pleading to which the proposed cross-complaint allegedly relates was dismissed several years earlier.

Plaintiff attempts to explain his delay, relying on evidence he presented below that he had asked his attorney to pursue his commission on the listing agreement earlier in the case, that his attorney had not done so, mistakenly believing that the statute of limitations had run, and that he had moved for leave to file his proposed cross-complaint as soon as he discovered the error (evidence of attorney error). Plaintiff does not provide a record

citation to support these contentions, as required by California Rules of Court, rule 8.204(a)(1)(C), and the trial court deemed it inappropriate, in any case, to consider plaintiff's relationship with counsel in the absence of a motion for relief. (See Code Civ. Proc., § 473.) Plaintiff does not challenge the trial court's conclusion in this regard and instead relies on our holding in *Silver Organizations Ltd. v. Frank* (1990) 217 Cal.App.3d 94, 99 (*Silver*), claiming that the trial court could properly deny his motion only on a finding of bad faith and that substantial evidence does not support such a finding. (See *ibid*., applying Code Civ. Proc., § 426.50.) Neither of these contentions calls for reversal here. First, our decision in *Silver* is distinguishable, as we considered in that case the trial court's rejection of a compulsory cross-complaint on the eve of trial of the related complaint, not seven months after the trial court had concluded, at the cross-complainant's insistence, that the related action had been dismissed. (See *Silver*, at p. 98.)

Substantial evidence also demonstrates that plaintiff did not act in good faith. The trial court found that he was "sandbagging," as he had known the facts giving rise to the cross-complaint before trial, and that this was a "transparent attempt to avoid the consequences of having lost at trial," "calculated to reopen the case for the sole purpose of avoiding an award of attorney fees" in defendant's favor. Conduct showing that a proposed cross-complaint is "merely a tactical, strategic maneuver" may constitute evidence of bad faith. (See *Gherman v. Colburn* (1977) 72 Cal.App.3d 544, 559-560, cited with approval in *Silver*, *supra*, 217 Cal.App.3d at p. 99.) Plaintiff did not move for leave to file his proposed cross-complaint until both parties had filed requests for attorney fees, vying for prevailing party status, and, indeed, sent a letter to the trial court asking that it defer its ruling regarding attorney fees, specifically to allow him to file such a motion. Additionally, plaintiff stridently and successfully contended that defendant's cross-complaint had been dismissed, then attempted to use it as a springboard to relitigate issues in his own action and to bring new causes of action long after judgment was rendered. Given the timing of the motion, the inconsistent and unfair positions taken by

plaintiff, and his attempt to assert matters that should have been, and could have been, raised at trial, substantial evidence supports a finding of bad faith.[18]

Plaintiff's evidence of attorney error does not change this result. First, even if true, it provides a good faith explanation only for his delay in seeking to recover his real estate commission, not his failure to diligently pursue his fraud cause of action or to discover defendant's transfer of the Railroad Avenue property almost three years earlier. Moreover, the trial court, to whose credibility determination we defer, apparently rejected this evidence, finding that the delay was not the result of attorney error, but a litigation tactic. Our role is a limited one: to decide " 'whether, on the entire record, there is substantial evidence, contradicted or uncontradicted,' " to support the trial court's finding. (*Silver*, *supra*, 217Cal.App.3d at p. 100, italics omitted.) " '[W]hen two or more inferences can reasonably be deduced from the facts, [we are] without power to substitute [our] deductions for those of the trial court. If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.' " (*Ibid*, italics omitted.)

III. ***Plaintiff's Motion to Amend or Void the Judgment***

A week after the trial court denied plaintiff's motion for leave to amend his complaint, he moved to amend or void the judgment, seeking to revive his own action by convincing the trial court to reverse its determination—for which he had fought fervently at trial—that defendant's cross-complaint had been dismissed in 2003. He emphasized the trial court's authority to correct "clerical errors" and asserted that because the cross-complaint had not been properly dismissed, the judgment was not final and therefore was void. On this basis, he sought to vacate the trial court's prior rulings denying his motions to assert new causes of action and its prevailing party determination.

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[18] Plaintiff faults defendant for rejecting his "fair proposal" to "relieve" defendant of the dismissal of his cross-complaint if he would agree to plaintiff's proposed cross-complaint, citing this as evidence that defendant's cross-complaint was a sham all along. Plaintiff overestimates his ability to reverse position, as well as his power to grant relief from a final determination of the trial court, when it suits his purposes. Such gamesmanship lends additional support to the trial court's finding of bad faith.

Appeal may be taken from an order denying a motion to correct a clerical error in the judgment or to vacate a void judgment. (See *Bowden v. Green* (1982) 128 Cal.App.3d 65, 68 & fn. 1, relying on *Oliver v. Superior Court* (1924) 67 Cal.App. 358 (1st Dist.) [clerical error]; *Residents for Adequate Water v. Redwood Valley County Water Dist.* (1995) 34 Cal.App.4th 1801, 1805 [void judgment].) An appeal generally does not lie, however, from an order denying a motion to vacate a judgment unless the motion is statutory (e.g., Code Civ. Proc., §§ 473, 663). (*Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, 358-359 [an order denying a nonstatutory motion to vacate is appealable only if the record on appeal from the order raises issues that are not disclosed or could not be disposed of on appeal from the judgment itself]; see *Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1394 [relief under Code Civ. Proc., § 473].)[19] We conclude that the order denying plaintiff's motion to amend or void the judgment is appealable to the extent the trial court denied his request to correct a clerical error and void the judgment, but not to the extent his motion otherwise sought to set aside the judgment as to the cross-complaint.[20] On appeal, plaintiff does not reassert his contention below that the judgment was void and provides

[19] Plaintiff did not purport to bring his motion under any statute authorizing the trial court to set aside the judgment, and indeed, did not meet the procedural requirements for such a motion. (See Code Civ. Proc., §§ 663, 663a [notice of intention to move to set aside the judgment must be filed within 15 days of service of notice of entry]; § 473 [within 10 days of the order with supporting affidavit].) He attached to his motion an affidavit in which his attorney admitted failing to appreciate and object to the defects in the judgment and characterized his omission in this regard as mistake, inadvertence, surprise, or neglect under Code of Civil Procedure section 473, specifically, but did not mention this section or seek such relief in his motion. Moreover, his attorney's affidavit appears to have sought relief, not from the dismissal, but from his failure to object to the proposed judgment. The trial court acknowledged plaintiff's allusion to this section, but declined to consider whether his showing was sufficient, opting to deny the motion on independent grounds. As plaintiff does not challenge this portion of the trial court's decision on appeal, we do not consider it.

[20] On appeal, plaintiff does not challenge the trial court's denial of his request to vacate its prior orders and has appealed instead from the orders themselves. He contends, however, that he has standing to challenge the judgment as to the cross-complaint because revival of the cross-complaint would require a different result on these motions.

no authority or analysis in this regard. Accordingly, we deem this issue abandoned, proceed to the error he asserts, and affirm the trial court's denial of his motion.

Once judgment is entered, the trial court has no jurisdiction to correct judicial error, except as provided by statute. (*APRI Ins. Co. v. Superior Court* (1999) 76 Cal.App.4th 176, 181.) The trial court has the power, however, to correct clerical errors in the judgment at any time. (Code Civ. Proc., § 473, subd. (d); *Rochin v. Pat Johnson Manufacturing. Co.* (1998) 67 Cal.App.4th 1228, 1238 (*Rochin*).) This distinction turns on whether the judgment accurately reflects the trial court's intended decision; if it does, the alleged error is judicial. (*In re Marriage of Kaufman* (1980) 101 Cal.App.3d 147, 151.) Clerical errors consist only of mistakes in the entry or recording of judgment, not those in rendering it. (*In re Candelario* (1970) 3 Cal.3d 702, 705; *Rochin*, at p. 1238 [not errors that are the product of judicial reasoning and determination].) Plaintiff claims that the trial court's error (i.e., deeming the cross-complaint dismissed) was clerical, as it occurred because the trial court overlooked a prior written order in the court file purporting to stay the cross-complaint. If the trial court had been aware of the prior order and rejected its significance, he contends, the error would have been judicial; but, since "no 'thought' [was] involved," it was clerical.

We observe, first, that, in his motion, plaintiff specifically took issue with the February 2007 "Judgment," which we have concluded has no legal significance. Accordingly, any error in this regard was not prejudicial. Moreover, even if we construe plaintiff's motion as a request to correct the appealable judgment—the December 2005 Order—we note that it is the trial court's substantive decision that plaintiff challenges, not the Order's failure to accurately reflect it. Indeed, plaintiff essentially concedes this point in asserting that the trial court would have reached a different conclusion if it had seen the written stay order.[21] As alleged, such error is judicial, and the trial court

[21] This is questionable in any case. Although the trial court did not know in December 2005 that a written stay order existed, it knew of a minute order purporting to stay proceedings on the cross-complaint, but accepted plaintiff's contention that Judge Kopp had no authority to issue such an order after entering a judgment of dismissal.

properly concluded that it could not amend the judgment, even if it were inclined to do so.

IV. *The Parties' Motions for Attorney Fees*[22]

Plaintiff's challenge to the attorney fee orders centers on the trial court's determination that defendant was the prevailing party on both the complaint and the cross-complaint, and its implied finding that plaintiff was not the prevailing party in either action.[23] Plaintiff asserts, for the first time on appeal, that he was the prevailing party in the "overall action." Blending together in his analysis the complaint, the cross-complaint, and both contracts, he concludes that his "net victory was, dollar-wise, at least [10] times larger than [defendant's]." Assuming that plaintiff can rely on this contention on appeal notwithstanding his failure to assert it below, we must reject it, as it is premised on a misconception of the legal framework governing attorney fee awards. (See *Palmer v. Shawback* (1993) 17 Cal.App.4th 296, 300 [new theories generally will not be considered on appeal, but the court may apply a new legal theory to the same facts].)

A. The Proper Inquiry Here Is Not Who Prevailed in the "Overall Action"

The parties to a lawsuit generally must bear their own attorney fees. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 806.) Except as specifically provided by statute, the recovery of attorney fees is left to the agreement of the parties (Code Civ. Proc., § 1021), and when authorized by a contractual provision, a prevailing party may recover his attorneys fees as costs. (Code Civ. Proc., §§ 1032, 1033.5, subd. (a)(10).) The

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[22] Orders granting or denying motions for attorney fees are appealable as special orders after judgment (Code Civ. Proc., § 904.1, subd. (a)(2); *P R Burke Corp. v. Victor Valley Wastewater Reclamation Authority* (2002) 98 Cal.App.4th 1047, 1053 (*Burke*).) The trial court's initial order granting defendant's motion for attorney fees is interlocutory, as it leaves the amount of the fee award for future determination, but defendant's entitlement to attorney fees is reviewable on plaintiff's appeal from the trial court's subsequent order setting the fee amount. (See *Burke*, at p. 1055.)

[23] We imply such a finding from the trial court's order denying plaintiff's motion, as we must presume the trial court's orders correct and supported by the record and indulge all inferences to support them on matters as to which the record is silent. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Higdon v. Superior Court* (1991) 227 Cal.App.3d 1667, 1671.)

factors governing a party's right to recover his fees under such a provision, including the standard for identifying the prevailing party, depend on the nature of the action. (See discussion, *Santisas v. Goodin* (1998) 17 Cal.4th 599, 606-619 (*Santisas*); see, e.g., Civ. Code, § 1717, subd. (b)(1) & (b)(2); Code Civ. Proc., § 1032, subd. (a)(4).) The recovery of attorney fees as costs in tort or other noncontract actions is determined under Code of Civil Procedure section 1032 et seq. (See *Santisas*, at pp. 602, 606, 617-618.) Civil Code section 1717 controls the recovery of attorney fees "[i]n any action on a contract." (See *Santisas*, at p. 615 ["If an action asserts both contract and tort or other noncontract claims, section 1717 applies only to attorney fees incurred to litigate the contract claims" [citation].) Plaintiff does not distinguish between the two provisions.

In evaluating plaintiff's contentions, such a distinction is necessary, as his analysis and supporting authority are correct only to the extent we consider the causes of action "on a contract." (See *Hsu v. Abbara* (1995) 9 Cal.4th 863, 871 (*Hsu*) [comparing the relief awarded on the *contract* claims].) The breach of contract cause of action and common counts in the complaint are unquestionably "on a contract." The fraud and negligence causes of action in the cross-complaint are not. The cross-complaint includes two causes of action for fraud, in which defendant alleges that plaintiff (1) misrepresented or concealed the value of the Railroad Avenue property and (2) promised, with no intention of performing, to use his "best reasonable effort and due diligence" to sell the Highland Avenue property. These are tort allegations that cannot be construed as actions "on a contract" under Civil Code section 1717. (See *Schlocker v. Schlocker* (1976) 62 Cal.App.3d 921, 922-923 [fraud in the inducement]; *Stout v. Turney* (1978) 22 Cal.3d 718, 724 [misrepresentations in the sale of a mobile home park]; *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1234, 1259 [misrepresentation of intent to honor guaranties to induce buyers into consummating sale].) The cross-complaint's remaining cause of action alleges that plaintiff had negligently performed his duties under the listing agreement. An action arising out of the negligent performance of a contractual duty may fall within the scope of section 1717, but this court has held specifically that causes of action for professional

negligence sound in tort and are not "on a contract." (See *Loube v. Loube* (1998) 64 Cal.App.4th 421, 429-430; cf. *Fairchild v. Park* (2001) 90 Cal.App.4th 919, 925-926 (2d Dist.) [when a negligence cause of action arises from a contractual relationship, the same act may be both a breach of contract and a tort, and the action is "on a contract" where the plaintiff has not elected a tort remedy].)

Accordingly, we must conclude that plaintiff's "net gain" analysis, in which he primarily weighs his failure to prevail in his action on the note against defendant's failure to recover on the cross-complaint, is not legally sound. We consider his contentions, however, to the extent they bear on the attorney fees awarded in connection with the contract causes of action in the complaint.

B. The Complaint: Actions "on a Contract" (Civ. Code, § 1717)

The note provides: "If action be instituted on this note I/We promise to pay such sum as the Court may fix as attorney's fees." Since defendant was the maker of the note and the only party executing it, this provision specifically authorizes an award of attorney fees only to plaintiff. Civil Code section 1717 establishes a mutuality of remedy, however, by which either party may recover his attorney fees and costs if he is the party prevailing on the contract, "whether [he] is the party specified in the contract or not." (See *id.*, § 1717, subd. (a); *Santisas*, *supra*, 17 Cal.4th at pp. 610-611.) The "party prevailing on the contract" is the party who recovered a greater relief in the action on the contract. (*Id.*, § 1717, subd. (b)(1); *Estate of Drummond* (2007) 149 Cal.App.4th 46, 50, citing *Hsu*, *supra*, 9 Cal.4th at p. 871.) In making this determination, the trial court compares the relief awarded on the contract causes of action with the parties' demands, considering the pleadings, trial briefs, opening statements, and other relevant sources to identify the parties' litigation objectives and determine the extent to which each has succeeded and failed in his contentions. (*Hsu*, at p. 876.) The trial court may conclude that neither party prevailed on the contract. (Civ. Code, § 1717, subd. (b)(1).)

Plaintiff sought to recover almost $64,000, the amount of the note plus interest, but failed to obtain in this action any of the relief he sought. He strains to show that he met his litigation objectives nonetheless, contending he succeeded in "preserving his

Note" and "defeating every affirmative defense except one," and claiming the trial court erred in failing to award him attorney fees and costs "in connection with the fights he won . . . ." However, plaintiff's objective was not to preserve his rights on the note, but to recover the amounts due thereunder. Moreover, the authority he cites does not establish that, in determining the prevailing party, a trial court must deconstruct the lawsuit in such a piecemeal fashion, defense by defense. On the contrary, as explained above, the trial court must identify the party who obtained the greater relief on the contract.[24] (Civ. Code, § 1717, subd. (b)(1).) The trial court correctly identified that party here. Although the trial court did not release defendant from his obligation altogether, he obtained a substantial portion of the relief he sought: to bar plaintiff's action on the note, require him to foreclose on the property, and enter judgment against him.

Plaintiff claims, however, that, since he "only temporarily lost the right to collect on [the note]," the dismissal was only an " 'interim' victory" that did not permit a prevailing party determination. Framed more clearly by the authority he cites, the issue is whether the trial court may determine the prevailing party when further litigation on the contract is contemplated. Plaintiff relies on *Estate of Drummond, supra,* 149 Cal.App.4th 46, in which the plaintiffs (clients) sought to recover attorney fees they had incurred in defending against a fee petition their former attorney had filed in probate court after contesting a will on their behalf. The appellate court reversed the probate court's grant of the petition, concluding it was a compulsory cross-complaint in a pending professional

[24] For the same reason, we reject plaintiff's related argument that the trial court should have treated the Highland Avenue listing agreement contract separately, and that he is entitled to attorney fees under that contract because the trial court rejected the cancellation defense. We also agree with defendant's assertion and the trial court's conclusion below that the listing agreement was not at issue at trial and was only a "piece of evidence" related to the defense. The listing agreement's renewal was the alleged consideration for plaintiff's cancellation of the note; its terms were not at issue at trial, and defendant was not seeking to enforce it in defending against the complaint. Accordingly, there was no action "on a contract" in connection with the listing agreement.

liability action that the clients had brought against the attorney in the same matter. (See *id.* at p. 49.) The probate court dismissed the fee petition, and the attorney filed a cross-action in the concurrent proceeding. (*Ibid.*) The Court of Appeal considered whether, in light of the continuing litigation of the fee issues in the ongoing action, the probate court's dismissal of the fee petition permitted a prevailing party determination. The court framed the issue, not in terms of the existence of a final judgment, but as whether a party can be said to have obtained a victory "on the contract." (See *id.* at pp. 51-52.) Noting that the plaintiffs had "only succeeded at moving a determination on the merits from one forum to another," the court concluded that they had not won a victory "on the contract" and affirmed the trial court's denial of attorney fees. (See *id.* at pp. 52-53 ["Living to fight another day may be a kind of success, and surely it is better than defeat. But as long as the war goes on, neither side can be said to have prevailed"].)

The facts in *Estate of Drummond* are analogous to those presented here. Neither the trial court nor the parties considered the litigation regarding defendant's obligation on the note to be at an end, and indeed, they all anticipated that the merits of the outstanding debt would be addressed in a future foreclosure proceeding against the property. The statute of limitations on such a proceeding expired in June 2005, however, before the trial court's decision, and when the trial court ruled on the parties' attorney fee motions, no proceeding against the Railroad Avenue property was pending or possible. (See Civ. Code, § 2911; Code Civ. Proc., § 337.) The question is whether a party who prevents his opponent from recovering directly on a secured note and forces him to proceed by foreclosing on the security instead has prevailed "on the contract," where that remedy is no longer available. We hold that he has. Indeed, in *Estate of Drummond*, the Court of Appeal suggested that a prevailing party determination would be appropriate in these circumstances: "We can conceive of cases where a party obtaining a dismissal of contract claims on purely procedural grounds might be found to have prevailed on the contract, even though the dismissal was without prejudice, because the plaintiff had no other means to obtain relief under the contract. Thus it might be shown . . . that a new

suit wherever brought would be subject to a bar such as the statute of limitations." (*Estate of Drummond*, *supra*, 149 Cal.App.4th at p. 53.)

C. The Cross-Complaint: Actions in Tort (Code Civ. Proc., § 1032)

As plaintiff provides no authority or analysis demonstrating that he was entitled to attorney fees on the tort causes of action under the applicable statute, Code of Civil Procedure section 1032, he has waived any error in this regard. (See *Benach*, *supra*, 149 Cal.App.4th at p. 852.) We observe that he would not have been entitled to such an award in any case. Attorney fees are recoverable as costs under this section only when authorized by a contract—in other words, when the cause of action falls within the scope of the attorney fee provision. (Code Civ. Proc., §§ 1021, 1032, 1033.5, subd. (a)(10)(A); *Santisas*, *supra*, 17 Cal.4th at pp. 602, 617.) Neither contract contemplates the recovery of attorney fees in connection with these tort causes of action. No cause of action in the cross-complaint may be construed as an action "on this note," and this provision cannot be read to encompass a fraud cause of action to which the note has such an attenuated connection.[25] The Highland Avenue listing agreement provides for the recovery of attorney fees and costs only in proceedings "regarding the obligation to pay compensation under this Agreement . . . ."

This begs the question of whether the trial court erred in making such an award to defendant. As neither contract authorized attorney fees in connection with the tort causes of action in the cross-complaint, neither party was entitled to recover such fees. Indeed, although defendant contended below that he was the prevailing party on the entire action since his cross-complaint was "defensive in nature," he conceded that if the trial court were to treat the cross-complaint separately, there was no prevailing party. Plaintiff did not rely on this argument below and does not assert it on appeal. On the contrary, he urged the trial court to make a prevailing party determination on the cross-complaint and

[25] Although defendant alleges in the cross-complaint that the fraud was committed in order to "obtain a commission in the form of a secured promissory note," the record demonstrates that the note had only an incidental connection to the cross-complaint. Defendant claimed that the source of the loan memorialized in the note was plaintiff's commission on the sale of the Railroad Avenue property.

takes issue only with that party's identity. We hold, accordingly, that he invited any error in this regard, and has waived his right to assert it in any case.

For these reasons, we affirm the trial court's orders denying plaintiff prevailing party status and awarding attorney fees to defendant. In so holding, we decline to address plaintiff's objection to the amount of attorney fees awarded, as we conclude that he has waived any such error. His analysis consists of a single, cryptic heading that he characterizes as "essentially self-explanatory," and he again attempts to incorporate his trial court arguments by reference, failing to provide even an accurate citation to the record. As discussed above, we do not consider these contentions. (See Cal. Rules of Court, rule 8.204; *Soukup*, *supra*, 39 Cal.4th at pp. 294-295 & fn. 20.)

DISPOSITION

For the reasons set out above, we dismiss plaintiff's appeal from the judgment and affirm the trial court's orders at issue in these consolidated appeals, with costs to defendant.

_____
Kline, P.J.

We concur:

_____
Haerle, J.

_____
Lambden, J.